534

SUPREME COURT OF THE UNITED STATES.

No. 91.

WM. M. GWIN, LATE MARSHAL, AND JACOB S. YERGER AND ROBERT HUGHES, HIS SURETIES, PLAINTIFFS IN ERROR,

vs.

C. T. & A. BARTON.

IN ERROR TO THE CIRCUIT COURT U. S. SOUTHERN DISTRICT OF MISSISSIPPI.

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J. & G. S. GIDEON, printers.

C. T. & A. BARTON
vs.
WILLIAM M. GWIN, late marshal, and his sureties.

Pleas before the honorable Samuel J. Gholson, district judge of the United States, at a circuit court of the United States, in and for the ninth circuit, and southern district of Mississippi, held at the town of Jackson, at the May term, in the year of our Lord one thousand eight hundred and forty-three.

Be it remembered that, heretofore, to wit, at a circuit court of the United States, continued and held at the town of Jackson, in and for the southern district of Mississippi, at the May term, in the year of our Lord one thousand eight hundred and forty-three, came C. T. & A. Barton, by Hughes & Brien, their attorneys, and filed the following notice of motion against Wm. M. Gwin, late marshal of the southern district of Mississippi, and Jacob S. Yerger and Robert Hughes, his securities, which said notice, with the endorsements and marshal's return thereon, is in the words and figures following, to wit:

To William M. Gwin, late marshal of the southern district of the State of Mississippi, and Jacob S. Yerger and Robert Hughes, his securities in his official bond.

Please take notice that on Wednesday, the 24th day of the present month, (May,) I will move the circuit court of the United States, for the southern district of the State of Mississippi, for a judgment against you for the sum of twenty-nine hundred and twenty dollars thirty-nine cents, being the amount [of] the plaintiffs' money mentioned in the writ of venditioni exponas, issued from said circuit court on the 14th day of November, 1840, in our favor, against Robert G. Crozier, Thomas J. Coffee, and R. S. Hardy, principals, and James J. King, and William H. Shelton, securities, for the said sum of twenty-nine hundred and twenty dollars thirty-nine cents, and which said writ commanded the said W. M. Gwin, then marshal, to expose the property therein specified to sale, to satisfy the money aforesaid, and interest, and costs due on said execution; and which execution or writ of venditioni exponas came to the hands of said Gwin in due time, and upon the same said Gwin voluntarily and without authority omitted to levy the money aforesaid. I will also ask said court for a judgment for interest on the sum aforesaid, at the rate of thirty per centum per annum from the first Monday in May, 1840, *til* paid.

You may attend and oppose said motion, if you think proper.

Your obt. servt.

C. T. & A. BARTON,
By ROBT. HUGHES, *their attorney.*

May 5th, 1843.

Marshal's return.

Executed on J. S. Yerger, May 19th, 1843.

ANDERSON MILLER, *Mar.*

By his dept. J. S. GOOCH.

Executed on William M. Gwin, May 20th, 1843.

ANDERSON MILLER, *Mar.*

By his dept. W. S. MILLER.

And afterwards, to wit, at a court continued and held as aforesaid, for the district aforesaid, on the 23d day of May, in the year of our Lord one thousand eight hundred and forty-three, came the said plaintiffs, by their attorney aforesaid, and moved the court for a judgment against the defendants according to the notice aforesaid.

And the said defendants, by attorney, comes and defends the wrong and injury, when, &c., and says that the motion of the said plaintiffs, and the matters and things as therein stated, are not sufficient in law to entitle the plaintiffs to any judgment against them, nor are they bound in law to answer the same, and this they are ready to verify; wherefore defendants do demur to the same, and pray judgment that the said plaintiffs may be barred from having or maintaining their motion against them.

And the said defendants, according to the form of the statute in such case made and provided, they assign the following causes of demurrer:

1st. There is no law which authorizes the making of such a motion.

2. The citizenship of either plaintiffs or defendants is not set out in the motion, or any part of the record in this cause.

3. If any motion will lie at all in this court against the marshal and his sureties, it must be in the name of the United States for the use of creditor.

4. The motion does not set out the bond or obligation of the defendants, or in what capacity, or to what extent, or upon what kind of obligation, Hughes and Yerger are Gwin's sureties.

5. The motion does not specify any breach of official duty upon the part of Gwin.

6. The motion does not show when any breach of official duty was committed by Gwin, or that the plaintiffs have been damaged thereby, nor to what extent.

7. The motion does not show or set forth a demand and refusal upon the part of Gwin, to pay over any money collected by him for plaintiffs.

8. There are many other causes of demurrer, which will be assigned at the hearing.

RUCKS & YERGER, *Att'y.*

And the plaintiffs say precludi non, by reason of any thing above set forth by the defendants, because they say that the said motion,

and the matters and things therein contained, are sufficient in law for the plaintiffs to have judgment, &c., and this they are ready to verify; wherefore they pray judgment, &c.

HUGHES, *for plffs.*

And now, at this time, to wit, at a circuit court of the United States, held as aforesaid, to wit, on the thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-three, came the parties aforesaid, by their attorneys, and thereupon the plaintiffs' motion for judgment against the defendants came on to be heard, and thereupon the demurrer of the defendants to the motion of the plaintiffs was argued, and because it seems to the court that the law is for the plaintiffs, it is therefore considered by the court that the said demurrer be overruled, and that the defendants answer over; whereupon the said defendants pleaded over.

And the said defendants, by attorney, come and defend the action instituted by motion against them in this behalf, and say that heretofore, before the entry of this motion against them, or notice that any such motion would be entered, suits had been instituted in this honorable court against them in favor of the United States of America against these defendants, upon the official bond of the said Gwin as marshal for breaches of the condition thereof, for sums of money collected by said Gwin, as marshal, and not paid over by him in amount larger than the penalty of said bond, which suits are still pending undetermined in said courts against these defendants, and judgments upon which cases will satisfy and discharge the penalty of said bond, and to the rendition of judgment, in which cases these defendants are liable; wherefore, &c.

RUCKS & YERGER, *Atty.*

And the plaintiffs say precludi non, by reason of any thing in the above plea pleaded, because they say the said plea, and the matters and things therein contained, are not sufficient in law to bar and preclude them from having and maintaining their motion aforesaid, and this they are ready to verify; wherefore they pray judgment, &c.

HUGHES, *for plffs.*

And the defendants say their plea, and the matters and things therein contained, are sufficient in law to bar and preclude the plaintiffs from having and maintaining their motion aforesaid, and this *he* is ready to verify.

RUCKS & YERGER, *Atty.*

And the matters of law upon this demurrer being argued and understood by the court, it is considered that said demurrer be sustained, and the defendant answer over. The defendants then refused to plead over, and on proof of the plaintiffs, it appearing to the satisfaction of the court that, on the 14th day of November, 1840, a writ of venditioni exponas was issued from the clerk's of-

fice of this court in favor of the plaintiff in this motion against Robert G. Crozier, Thomas J. Coffee, and R. S. Hardy, principals, and James J. King and William H. Shelton, sureties, for the sum of twenty-nine hundred and seventy dollars thirty-nine cents, besides interest and costs, by which the marshal of the southern district aforesaid was commanded to sell the property in said writ mentioned, to satisfy the said sum, interest, and costs as aforesaid; that said writ came to the hand of said William M. Gwin, marshal as aforesaid, in due time, and upon the same said Gwin voluntarily, and without authority, omitted to levy the money aforesaid, and that payment of the said money, due to the plaintiffs on said execution, was, by the said plaintiffs, since the return of the said execution, demanded of said Gwin; and it appearing also that said Gwin gave an official bond, with said Yerger and Hughes, his securities—

It is, therefore, considered by the court that the plaintiffs, the said Bartons, recover of the said Gwin, and Yerger, and Hughes, the said sum of twenty-nine hundred and twenty dollars thirty cents, the amount of the money due to the plaintiffs on the execution aforesaid, with interest thereon, at the rate of thirty per centum per annum, from the 1st Monday in May, 1841, till paid, together with their costs about this motion in this behalf expended, &c.

Bill of exceptions tendered by deft.

Be it remembered that, at this present term of this court, C. T. and A. Barton entered the following motion, (see notice and motion before copied,) which motion coming on to be heard before the honorable Samuel J. Gholson, on Saturday, the 27th day of May, William M. Gwin, Jacob S. Yerger, and Robert Hughes filed the following demurrer, (see the defendants' demurrer to the motion of the plaintiffs before copied, and also the joinder of the plaintiffs to said demurrer,) which demurrer being argued, was overruled, and the said defendants, Gwin, Yerger, and Hughes had leave to plead over, which they did, by filing the following plea, to which the said plaintiffs demurred, which plea and demurrer were in the following words, (see the plea and the demurrer thereto before copied,) which demurrer to said plea, after argument, the court sustained, and gave the said defendants leave to plead over, which they refused to do. The plaintiffs then offered in evidence the following venditioni exponas, with the return thereon, to wit:

UNITED STATES OF AMERICA, *southern district of Mississippi:*

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you, that you expose to sale those goods and chattels, lands and tenements, of Robert G. Crozier, Thomas J. Coffee, and Richard S. Hardy, principals, and James J. King and William H. Shelton, sureties, to wit, the following named negro slaves:

John, Tom, Monroe, Mary, Henry, Nathan, Piney, Elizabeth, Caroline, Martha, and Ellen; which, according to our command, you have taken, and which remain in your hands unsold, as you have certified to the judges of our circuit court, for the southern district of Mississippi, to satisfy Clark T. Barton and Armsted Barton, under the firm of C. T. & A. Barton, the sum of twenty-nine hundred and seventy $\frac{39}{100}$ dollars, with interest on the same at the rate of 8 per centum per annum, from the 23d day of May, 1839, until paid, and the sum of one hundred and seventy-four $\frac{25}{100}$ dollars, for costs and charges by them in that behalf expended, whereof the said plaintiffs have recovered execution against the said defendants by virtue of a certain judgment in our said circuit court. And that you have the said moneys before the judges of our circuit court, at a court to be held at Jackson, in and for the district aforesaid, on the first Monday of May next, to render to the said plaintiffs; and have you then and there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at Jackson, the first [L. S.] Monday of November, A. D. one thousand eight hundred and forty, and in the 65th year of the independence of the United States.

Issued the 14th day of November, A. D. 1840.

WM. BURNS, *Clk.*
By GEO. W. MILLER, *D. C.*

Endorsement.

No security of any kind is to be taken.

WM. BURNS, *Clk.*
By GEO. W. MILLER, *D. C.*

Marshal's return.

Made on this case 21st December, 1840, $50 00; also 4th January, 1841, $400; and applied to cost $270 61; leaving to cr. of judgment $179 39.

WM. M. GWIN, *Marsh.*
By C. G. GILMER, *Dep'y.*

He also offered to read the following bond in evidence, to wit:

Know all men by these presents that we, William M. Gwin, Robert Hughes, and Jacob S. Yerger, of the State of Mississippi, are held and firmly bound unto the United States of America in the just and full sum of twenty thousand dollars, lawful money of the United States; to which payment, well and truly to be made to the said United States, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, and firmly by these presents. Sealed with our seals, and dated this 25th day of November, A. D. 1839.

The condition of the above obligation is such that, whereas the above bound William M. Gwin has been appointed by the Presi-

dent of the United States, by and with the advice and consent of the Senate, marshal of the United States, for the southern district of Mississippi; now, if the said William M. Gwin shall, by himself and by his deputies, perform the duties of his said office faithfully and according to law, then this obligation to be null and void; otherwise to be and remain in full force and virtue.

WM. M. GWIN, [L. S.]
ROB. HUGHES, [L. S.]
J. S. YERGER. [L. S.]

Signed and sealed in the presence of.

I approve of the within bond and securities, this 25th day of November, 1839. Given under my hand.

S. J. GHOLSON,
Judge U. S. D. C. for Miss.

I, William M. Gwin, do solemnly swear that I will faithfully execute all lawful precepts directed to the marshal of the southern district of Mississippi, under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal of the southern district of Mississippi, during my continuance in said office, and take only my lawful fees, so help me God, this the 25th day of November, A. D. 1839. WM. M. GWIN.

I certify that the foregoing oath was taken and subscribed by William M. Gwin before me, this 25th day of November, in the southern district of Mississippi, in the year of our Lord one thousand eight hundred and thirty-nine.

S. J. GHOLSON,
Judge U. S. D. C. for Mississippi.

To the reading of which the defendants objected, which objection the court overruled, and the bond was read; to which order, overruling said objection, and permitting said bond to be read, the defendants excepted at the time the same was done. The plaintiffs then offered Robert Hughes as a witness, which the defendants objected to, as he was one of the defendants in said motion, which objection the court overruled, and permitted the said Hughes to be introduced as a witness by the plaintiffs; to which order overruling said last objection, and permitting the said Hughes to testify, the defendants, with the exception of Hughes, excepted at the time the same was done. The said Hughes then testified that he was the attorney of the plaintiff; that at the return term of the venditioni exponas before referred to in their favor, he went to the office of the marshal, and demanded the money on the same of Mr. Hunt, the office deputy of Dr. Gwin. Mr. Hunt said the money was not made; that the property mentioned in the venditioni exponas had been sold to William H. Shelton, who had promised to pay the money for it, but had failed to do so; and that he did not have the money to pay on said venditioni exponas; that he did not

want any motion against the marshal for said money, and wished a fieri facias to issue on the judgment of the plaintiffs for the benefit of the marshal. Said Hughes also proved that he had several times called on said Gwin, and told him he wanted the money on said venditioni exponas; and this being all the evidence on said motion, the court thereupon sustained said motion, and gave judgment in favor of said plaintiffs for the sum of $2,920 $\frac{30}{100}$ dollars, with interest, at the rate of thirty per centum per annum, from the first Monday in May, 1841, upon the said sum till paid, together with costs incurred about this motion; to all of which proceedings of the said court, as well as the rendition of said judgments, the defendants excepted at the time the same severally occurred, and now except, and tender this their bill of exceptions, which they pray may be signed, sealed, and made part of the record in this cause, which is done accordingly on this 30th day of May, 1843.

S. J. GHOLSON. [L. S.]

UNITED STATES OF AMERICA, *southern district of Mississippi.*

Circuit court, U. S.

I, William H. Brown, clerk of said circuit court, do hereby certify that the foregoing nine pages, and what is contained on this page, contain a full, true, and complete transcript of the record of the judgment in the case therein named, as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand, and affixed
[L. S.] the seal of said court, at Jackson, this 14th day of December, A. D. 1843.

W. H. BROWN, *Clk.*
Per CHS. H. ROGERS, *D. C.*

UNITED STATES OF AMERICA, *ss.*

To C. T. & A. Barton, or Robert Hughes, their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the ninth circuit and district of Mississippi, wherein Wm. M. Gwin, late marshal of the southern district of Missi., and Jacob S. Yerger and Robert Hughes, his securities, are plaintiffs, and you are defendants in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel J. Gholson, one of the judges of the circuit court of the United States, for the district of
[L. S.] Mississippi, this seventh day of June, in the year of our Lord one thousand eight hundred and forty-three, and in the 67th year of the independence of the United States.

S. J. GHOLSON.

Received and executed, June 12th, 1843.

ANDERSON MILLER, *Ml.*
By dept. J. S. GOOCH.

Marshal's fees.—Serving process		$2 00
Copy - -		50
		$2 50

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States, for the southern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between C. T. & A. Barton, plaintiffs in motion, and Wm. M. Gwin, late marshal of the southern district of Missi., and Jacob S. Yerger and Robert Hughes, his securities, defendants, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the second Monday of January, in the [L. S.] year of our Lord one thousand eight hundred and forty-three, and of the independence of the United States the 67th.

Issued the 7th day of June, A. D. 1843.

W. H. BROWN, *Clk.*

Filed, 8th Jan'y, 1844.